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No. 84-320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT NO. 27,
Petitioners,

v.

CROW TRIBE OF INDIANS; LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION; EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,
Respondents.

On Writ of the Certiorari to the United States Court of Appeals for The Ninth Circuit

REPLY BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is a federal claim for relief against Indian Tribal Governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

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PRELIMINARY STATEMENT

The respondents and the several *amici curiae* urging affirmance of the Court of Appeals decision raise four issues which will be discussed below: (1) Whether federal jurisdiction exists under 28 U.S.C. § 1331 (1966); (2) whether the petitioners were, as a condition precedent to utilizing such jurisdiction, required to have pursued any available tribal court remedies; (3) whether some or all of the Crow respondents are entitled to invoke the sovereign immunity defense; and (4) whether the tribal court had jurisdiction over petitioner Lodge Grass School District No. 27 under the facts herein. Careful analysis establishes that each of these issues must be resolved in the petitioners' favor.

ARGUMENT

I. No Substantial Argument Has Been Made By The Respondents Or Their *Amici Curiae* To Support The Court Of Appeals' Refusal To Find Federal Question Jurisdiction.

Only respondents Sage and Not Afraid, joined by *amici curiae* Salt River Pima-Maricopa Indian Community and Gila River Indian Community, argue that federal question jurisdiction does not exist with respect to the amended complaint. (Sage Br. 5-14; Pima-Maricopa Br. 5-6.) The Crow respondents are silent on this issue although, by arguing that exhaustion of tribal remedies should have preceded resort to federal court, tacitly admit the presence of jurisdiction under 28 U.S.C. § 1331. (Crow Br. 13-21.) *Amicus curiae* United States concedes the existence of federal jurisdiction because "the boundaries of tribal jurisdiction are defined by federal law" and "a non-Indian claiming injury from tribal 'jurisdictional excesses' [thus] states a 'federal question' case under Section 1331." (U.S. Br. 5.) The remaining *amici curiae* supporting affirmance do not

address the federal question issue. (Assiniboine Br. 19 n.18.)[1]

Sage and Not Afraid's analysis of the federal question issue is, at best, a hodgepodge of misapprehensions and analytical *non sequiturs*. They first suggest that federal question jurisdiction does not exist because (1) the petitioners did not attempt to persuade the United States or the Crow Tribe to institute a civil action in federal district court under 28 U.S.C. § 1345 (1976) or 28 U.S.C. § 1362 (1976) and (2) the petitioners could have exhausted tribal court remedies and then sought review by appeal to or certiorari from this Court. Quite obviously, however, whether the United States or the Crow Tribe would have been willing to commence a federal action for the purpose of permitting the petitioners an opportunity to litigate the tribal court jurisdiction issue is—despite the outlandish factual predicate, irrelevant to whether § 1331 jurisdiction exists as to the amended complaint; such jurisdictional determination must instead be based on the nature of the asserted claim. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974). Equally outlandish is the suggestion that the Court may review tribal court decisions as a matter of course; the Court's jurisdiction in such matters is, without question, limited to review of federal, state, certain territorial and

[1]The *amici curiae* brief filed jointly by the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Cheyenne River Sioux Tribe, Devils Lake Sioux Tribe, Mescalero Apache Tribe, Nez Perce Tribe, Pueblo of Laguna, Seneca Nation of Indians, Standing Rock Sioux Tribe, American Indian Lawyer Training Program, Inc., Association on American Indian Affairs, Inc., National American Indian Court Judges Association, National Indian Justice Center and Northwest Intertribal Court Association will be referred to in the text as the Assiniboine Brief; these *amici curiae* will also be referred to collectively as the Assiniboine.

military court decisions. *See, e.g.*, 28 U.S.C. § § 1254, 1257, 1258 and 1259 (1966).

Sage and Not Afraid next argue federal question jurisdiction herein would render the district court an appellate tribunal for tribal court decisions. Such contention, however, mistakes the thrust of the amended complaint, which is directed to the sole issue of whether the tribal court had jurisdiction to proceed against petitioner School District. The petitioners did not, conversely, request the district court to review the merits of the underlying tort claim. The focused nature of the amended complaint further undercuts Sage and Not Afraid's extravagant assertion that, "[i]f [the petitioners'] interpretation of section 1331 is adopted, every action commencing in a tribal court raising the requisite federal question will be subject to federal injunction which, in effect, will remove the case to federal court." (Sage Br. 13.)

Finally, Sage and Not Afraid's perfunctory nod to the Court of Appeals' refusal to find a valid federal common law claim adds nothing to its reasoning. (Sage Br. 14.) The appeals court's misplaced reliance on *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981), was thoroughly analyzed in the petitioners' principal brief and need not be repeated. (Pet. Br. 8-12.) Moreover, the Court's recent decision in *County of Oneida* v. *Oneida Indian Nation*, 52 U.S.L.W. 4225, 4227-29 (Mar. 4, 1985), concluding that the Oneida Nation could maintain an action under section 1331 based on federal common law for violation of its aboriginal land rights, not only expressly recognized such a claim in an Indian law context but also distinguished *Milwaukee* v. *Illinois*, *supra*, on the basis that subsequent legislation—the Trade Nonintercourse Act of 1793, 1 Stat. 329, did not preempt the federal common law claim. The Court's analysis in *Oneida* is fully consonant with that of the petitioners in their principal brief.

Finally, Sage and Not Afraid make no effort to address the detailed and sophisticated arguments raised in the petitioners' and various *amici curiae* briefs concerning the existence of federal question jurisdiction. Indeed, the absence of any credible effort to support the Court of Appeals decision is, in view of the section 1331 issue's significance to this case and generally, remarkable. It is abundantly clear that the appeals court's *sua sponte* conclusion that federal jurisdiction was lacking must be reversed.

II. Exhaustion Of Alleged Tribal Court Remedies Should Not Be Required Under The Circumstances Herein.

The Crow respondents, Sage and Not Afraid and *amici curiae* Assiniboine argue at length in support of Judge Wright's concurring and dissenting opinion below (Pet. 11a-13a) that the petitioners should have exhausted tribal court remedies before invoking the district court's jurisdiction. (Crow Br. 13-21; Sage Br. 13-24; Assiniboine Br. 19-25.) The United States does not address this issue other than observing vaguely that "[t]he availability of a tribal court remedy perhaps should have cautioned the district court to withhold federal injunctive relief." (U.S. Br. 7.)

Unlike Judge Wright, whose exhaustion analysis derived from decisions involving actions based on the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1982), prior to *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), the Crow respondents weave an ornate analytical tapestry premised on an identity of policy interests between traditional comity concerns underlying refusals by federal courts to interfere with state court proceedings and the fostering of tribal self-government. *See, e.g., Donovan* v. *Dallas*, 377 U.S. 408 (1964); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice* v. *Vail*, 430 U.S. 327 (1977). While perhaps an initially appealing analogy, it nonetheless confuses basic

notions of federalism with the unique and federally dependent status of tribes.

The substantive question lying at the core of the amended complaint resolves itself on whether the tribal court's assertion of jurisdiction over petitioner School District was inconsistent with the Crow Tribe's dependent status under federal law since, "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). Where the very existence, and not merely the improper application, of such sovereignty is questioned, resort to exhaustion notions as a matter of comity is manifestly inappropriate. There exists neither logic nor equity in requiring the petitioners to request the Crow tribal court, which clearly has no authority to speak with respect to the allegedly tortious conduct, to rule that it has no such authority. Not only is the possibility of such a ruling, as developed below, the most transparent of legal fictions, but such a requirement also mandates submission to a tribunal which lacks any power to affect petitioner School District's legal interests under the facts herein.[2]

The futility of tribal court exhaustion on the jurisdiction issue is patent. First, the tribal court expressly found jurisdiction over petitioner School District in its October 25, 1982

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[2]The petitioners naturally recognize that a tribal court ruling favorable to their position on the jurisdiction issue would moot this controversy. Nonetheless, the theoretical possibility of such a decision does not support what, in essence, is suggested as a *per se* exhaustion requirement. The undisputed facts unquestionably establish the rhetorical nature of the Crow respondents' claim that tribal court remedies as to this issue are meaningful.

order. Since the facts germane to such a conclusion are undisputed and the issue itself so fundamental as, presumably, to require independent analysis by the tribal court, it is obvious that reconsideration favorable to the School District would not occur. Second, the tribal court judge who entered the order would sit as one of three judges to determine any appeal therefrom. While such a procedure may, because of *Talton* v. *Mayes*, 263 U.S. 376 (1896), and an obviously narrow Secretarial interpretation of 25 U.S.C. § 1302(8), be an acceptable appeal procedure for tribal court purposes, it does not merit consideration as a substantial basis for requiring appellate exhaustion. Finally, and most important, the tribal court judges have, through the District Court and Court of Appeals proceedings below, argued that their court *did* have jurisdiction over the School District. There is, therefore, no reasonable question that exhaustion of tribal court remedies would unnecessarily burden the petitioners with further delay and costs.[3] Application of the exhaustion doctrine is manifestly unwarranted under these facts.

III. The Crow Respondents' Claim Of Sovereign Immunity Is Both Analytically Flawed And Irrelevant.

The Crow respondents argue that the sovereign immunity doctrine requires their dismissal from this matter. (Crow Br. 7-13.) Although recognizing that Sage and Not

[3]The Crow respondents state in their brief at 13 n.6 that, "[s]ince the Crow Tribal Court and its judges have not been afforded the opportunity to address or rule on [the jurisdiction issue], the arguments presented [as to such issue] do not necessarily state the position of the tribal court or its judges." However, such judicial neutrality was, as stated in the text, not manifested before the District Court or the Court of Appeals where the tribal court respondents, in concert with the other Crow respondents, vigorously asserted their court's jurisdiction over petitioner School District.

Afraid would, even with such dismissal, be appropriate party defendants,[4] they suggest remand is necessary for determination of whether this action should be dismissed under Fed. R. Civ. P. 19(b). (*Id.* at 12.) Nonetheless, their position ignores (1) the interrelated nature of their sovereign immunity and the question of whether the tribal court had jurisdiction over petitioner School District and (2) the clear viability of this action even without their presence as defendants.

While the Court has not sketched the full nature and scope of tribal sovereign immunity,[5] it clearly exists only to the extent that the challenged conduct falls within the scope of the tribe's sovereignty rights. Thus, "tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers . . . ." *Snow* v. *Quinalt Indian Nation*, 709 F.29 1319, 1321 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2655 (1984). The existence of sovereign immunity in this case is, therefore, inextricably connected to the merits of the underlying tribal court jurisdictional issue. The Crow respondents seemingly recognize this general principle but argue that (1) the non-tribal court respondents have no connection to the dispute and (2) the tribal court respondents are excepted from the class of tribal officials against whom injunctive relief may lie. (Crow Br. 10-11.)

Even if the Crow respondents' argument concerning the non-tribal court defendants is accepted, the unavailability of injunctive relief against the tribal court defendants cannot

[4]*See Puyallup Tribe* v. *Washington Department of Game*, 433 U.S. 165, 171-72 (1977).

[5]*See generally Santa Clara Pueblo* v. *Martinez*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers").

be. The Crow respondents' position is derived analogously from the principle that, as a general matter, a federal court may not enjoin an ongoing state court proceeding. *See Ex parte Young*, 209 U.S. 123, 163 (1907). That principle, which again flows from notions of federal and state court comity, is inapposite for those reasons stated above in connection with the exhaustion question. There exists no sound policy rationale upon which to accord tribal court officials any greater degree of immunity from federal court relief when their conduct exceeds the bounds of their tribe's sovereignty rights, will clearly not be rectified through further tribal court proceedings and may, as found by the District Court, result in execution of the tribal court judgment and irreparable harm.

Sustaining the Crow respondents' sovereign immunity defense, moreover, does not warrant failing to reach the tribal court jurisdiction issue. Neither Sage nor Not Afraid enjoys immunity from suit, and they can be, indeed have been, subject to injunctive relief by the District Court which requires, *inter alia*, return of seized computer equipment to petitioner School District. The Crow respondent's suggestion that remand is appropriate for a Rule 19(b) determination is thus a rhetorical attempt to avoid reaching the tribal court jurisdiction question; neither precedent nor reason supports the argument that they are, or may be, indispensable parties since, for purposes of enjoining enforcement of the judgment, the presence of Sage and Not Afraid is sufficient for complete and binding relief.[6]

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[6]The tribal court judgment is, of course, not self-executing; execution proceedings must instead be instituted by Not Afraid on Sage's behalf. The Crow respondents' interest in whether the judgment is enforced is consequently indirect. It must be emphasized that the validity of the Crow Tribal Code is not at issue.

IV. The Crow Tribe's Sovereignty Rights Do Not Extend To Assertion Of Tribal Court Jurisdiction Over Petitioner School District Under The Facts Herein.

A. *The Importance of Montana.*

The petitioners have relied extensively on *Montana* v. *United States*, 450 U.S. 544 (1981), before the lower courts and in its principal brief herein because, quite simply, they believe it directly controls the substantive issue of whether the tribal court properly asserted jurisdiction over petitioner School District. While the respondents and their supporting *amici curiae* trace at length the somewhat tortured path of modern Indian sovereignty analysis, they obscure two critical points: (1) *Montana* represents the Court's most comprehensive and, in view of the instant facts, relevant treatment of tribal sovereignty; and (2) *Montana* is fully consistent with earlier and later sovereignty decisions.

Despite the respondents' and several *amici curiae's* attempt to blur the distinction between the relationship of the United States to the several States and that of the federal government to Indian tribes, there can be no question that the sovereignty rights possessed by tribes are both limited and *sui generis*. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 208, the Court thus observed:

> Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government . . . . But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized Indian tribes are prohibited from exercising both those powers of autonomous

> states that are expressly terminated by Congress *and* those powers "*inconsistent with their status.*" . . . *[Emphasis in original.]*

As in Oliphant, which concluded that tribes do not have the retained authority to prosecute nonmembers for criminal offenses, analysis of a tribe's inherent sovereignty rights must be made principally with reference to

> the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them. . . .

Id. at 206. *Wheeler* v. *United States*, 435 U.S. 313 (1978), immediately used this analytical structure to determine that tribes do retain the power prosecute their own members and that such power is, therefore, not delegated to them from the United States. Most importantly for present purposes, however, *Wheeler* noted that, while "internal criminal laws" involving only members' interests are a proper manifestation of retained sovereignty, the tribes' dependent status is "necessarily inconsistent with their freedom independently to determine their external relations." 435 U.S. at 328.

Oliphant and *Wheeler* thus carefully differentiated between retained sovereignty rights as to regulation of members' conduct and the general lack of such authority as to nonmembers. While this dichotomy has exceptions,[7] the

[7] *Washington* v. *Confederation Tribes of Colville*, 447 U.S. 134 (1980) (upholding tribes' authority to tax on-reservation, consensual cigarette purchases by nonmembers); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (sustaining validity of tribal oil and gas tax on nonmember lessee of tribal lands).

Court has never sustained, on the basis of retained sovereignty, a tribe's right to order the conduct of nonmembers on fee lands within a reservation in the absence of such nonmembers' consent. The lack of such holding reflects not only the fundamental precept that "[i]n this Nation each sovereign governs only with the consent of the governed"[8] but also the bedrock proposition that, with certain highly restricted exceptions, tribal retained sovereignty has application only to regulation of members.

The importance of *Montana* lies in its recognition of this distinction and in articulation of those limited instances in which a tribe's retained sovereignty may extend to nonmember conduct: (1) Regulation attendant to "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements"; and (2) the exercise of "civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." 450 U.S. at 565-66. As developed below, not only have the respondents failed to justify application of the second exception, but they have also suggested no legitimate basis upon which to warrant modifying *Montana*.

B. *The Respondents' Arguments.*

1. Attempts to Distinguish Montana.

The Crow respondents suggest *Montana* is inapplicable because "it is predicated on the absence of a nexus between the conduct of non-Indians hunting and fishing on non-Indian owned lands within the reservation and any significant Indian interest." (Crow Br. 24.) They also contend that,

[8] *Nevada* v. *Hall*, 440 U.S. 410, 426 (1979).

because a large percentage of the students attending the Lodge Grass Elementary School are Crow members and because members constitute a majority of the petitioner School District's board, the School District is, "[o]n a spectrum with Indians on one end and non-Indians on the other, . . . somewhere in between, a hybrid, but closer to the Indian side." (*Id.* at 28-29.)

It must first be emphasized that Sage, while a Crow member, was present on school property at the time of his injury in his capacity as a Montana citizen and subject to Montana laws regulating the education of children. *See* § 20-5-108, MCA. Similarly, petitioner School District itself is duly constituted under and is admittedly subject to Montana law. *See* § 20-6-101(2), MCA. Members of the School District's board, whether Crow or nonmember, and the School District's employees, whether Crow or nonmember, are subject to Montana law when acting in their official capacities. The Crow respondents' suggestion, therefore, that tribal membership status has legal significance with respect to the law governing the School District's conduct or somehow metamorphoses the District into a tribal agency is palpably incorrect. Equally untenable is the related argument that, for purposes of distinguishing *Montana*, Crow members' interaction with the School District in their role as Montana citizens must be construed as establishing a *tribal* interest. Nonetheless, legal relationships, even on Indian reservations, must be viewed in context, and the context here is structured entirely under state law and largely without reference to, or consideration of, tribal membership status.[9]

[9]This case must be distinguished from *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832 (1983), which found preempted New Mexico's attempt to impose a gross receipts tax on a non-Indian construction firm for work performed under a contract with a Navajo tribal school board. The Court concluded that the "detailed regulatory scheme governing the construction of autonomous Indian education facilities" was so comprehensive as to preclude the state tax. *Id.* at comprehensive regulation by the United States of petitioner School District's activities, and the respondents have alleged none.

The Crow respondents' argument also ignores *Montana's* recognition that the General Allotment Act of 1887, 24 Stat. 388, and later allotment statutes clearly anticipated assimilation of the Indian population into state governmental and societal structures. As the Court noted, "There is simply no suggestion in the legislative history [of the General Allotment Act] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian lands was consistently equated with the dissolution of tribal affairs and jurisdiction." 450 U.S. at 559 n.9. Instantly, that policy is vividly portrayed by the common public education of Indian and non-Indian children in accordance with state law. If any inference can be drawn from this paradigmatic reflection of the allotment statutes' underlying objective, it is that state, not tribal, law should determine the nature and extent of any legal obligation owed by petitioner School District to its students in the absence of contrary congressional directives.

In sum, there is no reasoned basis to distinguish *Montana* because of Sage's tribal membership or because of tribal members' involvement in petitioner School District's operation. That relationship is grounded on those individuals' status as Montana citizens and is, in all material respects, governed by Montana law. The Crow Tribe, in contrast, lacks any sovereignty rights, retained or otherwise, with respect to the School District's operation. *See Rice* v. *Rehner*, 103 S. Ct. 3291, 3295 (1983).

2. Claimed Adverse Impact on Tribal Governmental Interests.

In various formulations, the respondents and their *amici curiae* argue that a refusal to sustain tribal jurisdiction "will adversely affect the tribe's self-governance rights." (Crow Br. 22-23; Sage Br. 40-41; U.S. Br. 13, 16-18; Assiniboine Br. 5-8.) They most commonly rely on *Williams* v. *Lee*, 358 U.S. 217 (1959), as support for the notion that the Crow tribal court should be deemed to have jurisdiction herein.

Williams is, of course, factually inapposite since it involved the question of whether a state court could assert jurisdiction over a nonmember Indian trader's claim against two members deriving from an on-reservation transaction. The Court held that, under those facts and absent the tribal members' consent to state court jurisdiction, the nonmember was required to proceed in tribal court. *Williams* is further inapposite because it did not directly or indirectly confront the question of whether a tribe's retained sovereignty encompasses civil jurisdiction over a nonconsenting nonmember where the disputed conduct occurs on fee lands and the underlying relationship between the member and nonmember is governed by state law. Indeed, the Navajo tribal court deferred to in *Williams* was a Court of Indian Offenses whose civil jurisdiction did not encompass a member's claim against a nonconsenting nonmember. 358 U.S. at 222; *see* 25 C.F.R. § 11.22 (1959).

Furthermore, the simple fact that Sage is a tribal member does not mean that his inability to redress the alleged wrong in tribal court affects the tribe's economic security or health and welfare in any legally cognizable manner. First, *Montana* was careful to refer to "the health and welfare of the *tribe*" and thus clearly contemplated regulation of conduct constituting something more than an occasional injury to a single member. Second, the legal interest of the tribe in

regulating the relationship between petitioner School District and Sage is, as stated above, greatly attenuated by the state law-based nature of the relationship. Third, Sage had an adequate and readily accessible forum under Montana law in which to litigate the School District's allegedly tortious conduct. *See Three Affiliated Tribes* v. *Wold Engineering*, 104 S. Ct. 2267, 2274 n.7 (1984). The real tribal interest, after all, lies principally in the purported wrong to a member being capable of redress and not in using such wrong as an opportunity to expand the tribe's supposed authority. The relationship between Sage's injury and any substantial governmental interest of the tribe is thus so tenuous as to be nonexistent.

3. Sovereign Immunity Considerations.

The respondents and their *amici curiae* uniformly challenge the relevance of sovereign immunity considerations in this matter. (Crow Br. 30-31; Sage Br. 43-47; U.S. Br. 10-12; Assiniboine Br. 18-19.) Their analysis, however, misses the mark because the importance of sovereign immunity presently is not as a defense to the underlying tort claim but to whether Congress ever intended tribes to exercise civil jurisdiction over state political subdivisions.

There is no dispute that, until very recently, state political subdivisions were immune from suit in their own courts for tortious conduct attendant to the exercise of governmental functions. *See generally* T. Cooley, *Law of Torts* §§ 72, 388 (4th ed. 1932); F. Harper & F. James, *Law of Torts* §§ 29.4-29.6 (1956). Montana, like many other states, has eased the common law rule and now, within certain limits, permits actions to be maintained against it and its political subdivisions in state courts. *See* §§ 2-9-301 to 2-9-318, MCA. It is anomalous, however, to argue that Congress, at the time the various allotment statutes were enacted, con-

templated state political subdivisions could be subjected to the nonconsensual civil jurisdiction of tribal courts for conduct on fee lands but not subjected to such jurisdiction within their own courts. Petitioner School District's traditional sovereign immunity, while not dispositive of the tribal court jurisdiction issue, does constitute persuasive support for the conclusion that Congress never intended matters like Sage's injury and the School District's alleged culpability therefor to be resolved through tribal court action. The fact that Montana policy has changed concerning immunity should not, of course, affect the scope of *retained* tribal authority which, by its nature, is independent of state law.

4. Executive Branch Recognition of Tribal Court Civil Jurisdiction over Nonmembers.

Amici curiae United States and Assiniboine refer to the recent proliferation of tribal court civil jurisdiction over nonmembers as evidence of retained sovereignty in such matters. (U.S. Br. 16-18; Assiniboine Br. 25-28.) They also point to 7 Op. Att'y Gen. 174 (1855) as early Executive Branch recognition of tribal court jurisdiction over nonmembers. (U.S. Br. 14-15; Assiniboine Br. 10.) They have not, however, cited any modern authority remotely relevant to Executive Branch approval of tribal court jurisdiction under the facts herein.

7 Op. Att'y Gen. 174 is, inapposite. It dealt with a non-Indian married to a tribal member, living within the Chickasaw and Choctaw Reservation which was then not in any state, and exercising all rights of a Chickasaw member in the Choctaw and Chickasaw union. Irrespective of his possibly coexisting status as a United States citizen, he had clearly consented to regulation by the Choctaw courts. Neither the United States nor the Assiniboine, moreover, addresses the stark and undisputed fact that Courts of Indian Offenses, including that previously established for

the Crow Tribe, have never exercised civil jurisdiction over non-Indians without their consent. *See* 25 C.F.R. §§ 11.22, 11.22C (1984). Quite obviously, therefore, nothing in express Executive Branch policies with respect to the retained sovereignty rights of tribes in such matters supports the respondents' position.

The mere fact that, as the United States asserts, "no less than 66 Tribes expressly assert civil jurisdiction over non-Indians in some circumstances" is, aside from its singularly indefinite phrasing, of little moment. That 33 tribal codes purported to extend criminal jurisdiction to nonmembers did not prevent the Court in *Oliphant*, 435 U.S. at 196-97, from finding such claimed jurisdiction improper. Consequently, the "relatively new phenomenon" of tribal courts asserting claimed jurisdiction over nonconsenting nonmembers, even if such jurisdiction is deemed *arguendo* to be plenary and outside the limited instances covered by *Montana's* second exception, does not assist the respondents' position.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed and Judge Battin's judgment should be upheld given his careful analysis of the undisputed facts in this unique case.

Respectfully submitted,

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